

# TENNESSEE ETHICS COMMISSION

## *MINUTES OF APRIL 24, 2007*

Pursuant to the call of Chairman Thomas J. Garland, the Tennessee Ethics Commission ("Commission") met on Tuesday, April 24, 2007, at 9:00 a.m. in the auditorium of the Tennessee State Library and Archives Building in Nashville, Tennessee.

The following members were present:

Thomas J. Garland, Chair

Donald J. Hall

Linda W. Knight

Dianne F. Neal

Benjamin S. Purser, Jr.

CHAIRMAN THOMAS J. GARLAND CALLED THE MEETING TO ORDER AT 9:10 A.M.

Chairman Garland announced that Commissioner Brown was absent due to a health issue but could be contacted by phone if needed.

Chairman Garland sought approval of the March 20, 2007 meeting minutes. Commissioner Neal requested to clarify Senator Kyle's stated purpose for attending the meeting. She recommended changing the second sentence of the applicable paragraph on the first page to read, "He had several conversations with Mr. Androphy and realized that he needed to come speak to the Commissioners directly." Commissioner Neal also asked to change the title for Anne Turner from "Lead Attorney" to "General Counsel" for consistency and to correct Allegra Montgomery Walker's name.

Commissioner Hall moved to approve the March 20, 2007 meeting minutes as amended.

Commissioner Knight seconded the motion.

The motion was unanimously approved.

CHAIRMAN GARLAND RECOGNIZED BRUCE ANDROPHY FOR THE EXECUTIVE DIRECTOR'S REPORT.

Mr. Androphy announced that, as of April 13, 2007, 521 lobbyists and 644 employers of lobbyists have registered with the Commission and over \$400,000 in registration fees had been collected from these groups. He also stated that the pace of registrations has slowed down considerably and he does not expect to have many additional registrations during the next few months.

Mr. Androphy discussed the three (3) lobbyist training sessions currently scheduled in June. He announced that one of these training sessions will be scheduled in one of the Legislature's facilities with video-conferencing capabilities, but the date could not be set

until the Legislature is out of session. He also requested to have an additional lobbyist training session on September 10, 2007, at the Montgomery Bell State Park during the Tennessee Lobbyist Association's annual retreat. He stated that this request was made to him by Mark Greene, on behalf of the Tennessee Lobbyist Association.

Commissioner Hall moved for approval of the additional lobbyist training session in September. Commissioner Purser seconded the motion. The motion was unanimously approved.

Mr. Androphy discussed the website and provided information as to the number of hits each page of the website has received.

Mr. Androphy reported that a total of 6,200 local officials were required to file this year and only 174 officials have not yet filed. He stated that the staff is continually working to obtain all of the correct information for these officials. He announced that about 200 warning letters had been sent out to non-filing officials. He also stated that he anticipates sending civil assessment letters to those who fail to respond.

Commissioner Neal requested Mr. Androphy to present the civil assessment letter to the Commission before any are mailed to the local officials. Mr. Androphy agreed to this request.

Mr. Androphy also announced that all of the forms that were required to be filed by April 15th by the Members of the General Assembly, Governor, Governor's Cabinet, and Constitutional Officers have been filed with the Commission. Mr. Androphy stated that all of these forms should be posted on the website by the end of the week. Anne Turner, General Counsel for the Commission, stated that about 90 percent of these forms are currently posted.

Mr. Androphy stated that the staff has been very active in training state agencies. He said many other additional requests for trainings have been made as a result of the recent trainings. Commissioner Neal asked if there are a minimum number of people required to attend the ethics training class. Mr. Androphy responded that trainings are usually scheduled for at least twenty (20) people and the smaller agencies are combined with other departments.

Commissioner Neal asked Ms. Turner about the Continuing Legal Education ("CLE") credit for those attorneys that have attended the ethics training course. General Counsel, Anne Turner, stated that CLE credit is given to the attorneys that attend a training session and a system to provide this information to the CLE Board has been established. She also stated that the information is not posted until the CLE credit has been paid for by the State through a journal voucher.

Mr. Androphy discussed the status of the electronic filing projects. He announced that the project is going forward to expand on-line registration for lobbyists and employers of

lobbyists and for the implementation of the online filing system for the required statement of disclosure of interest forms. He stated that the proposals will come before the State's portal committee on April 20th and he does not foresee any problems in obtaining the committee's approval.

Mr. Androphy announced that he and the staff have had initial discussions with the Office of Information Technology ("OIR") regarding a web-based on-line training course for middle management and lower-level employees of the different State agencies. Mr. Androphy stated that he envisioned senior management of State agencies to continue to have in-person ethics training courses. He also suggested that the on-line training program could be designed so that the employee would receive a certificate upon completion of the training. He stated that OIR anticipates a development cost of less than \$10,000 and that there would not be any type of hosting fee. Mr. Androphy sought authorization to move ahead with the on-line training course proposal.

Commissioner Purser asked how Mr. Androphy plans to insure that the State employee is the person actually taking the on-line test. Mr. Androphy stated that this requires a good faith element but the employee can be required to log-in through their state e-mail address.

Commissioner Neal stated that, under the law, the Commission has the capability to approve other existing, or newly revised ethics courses for middle management. Mr. Androphy responded that the training course selected must be targeted with the new Tennessee ethics law, along with specific Ethics Commission information. Commissioner Neal suggested approving other State agencies' ethics trainings, as they may be more specific for that particular audience and their individual job functions.

Commissioner Knight asked Mr. Androphy if the suggested \$10,000 was for the development of a single on-line training course. Mr. Androphy responded that this maximum amount would be to develop one course for the various state agencies that could be easily adapted in the future.

Next, Mr. Androphy requested approval of the random-sampling method selected for the lobbyist audit. He stated that the selected program is also used by the Comptroller's Office and that a representative from the Attorney General's office would be present during the random selection of lobbyists.

Commissioner Purser asked if the presence of the Attorney General's office would be necessary for this and future auditing selections. Chairman Garland suggested that if the first random selection be conducted in conjunction with the Attorney General's Office, it may provide more credibility to the selection process. Commissioner Purser suggested also having Mr. Greene, from the Lobbyist Association, present as an interested party. Mr. Androphy clarified that the law requires the Attorney General or his designee to be present during the audit selection process.

Commissioner Knight asked whether the sampling method would be performed more than once. Mr. Androphy stated that the program would be run twice during the selection process in order to use the first run for testing purposes. He also clarified that the process is performed in a very short time frame.

Next, Mr. Androphy suggested having some future Commission meetings in other Tennessee cities. Chairman Garland stated that this would be a good option for later consideration. Commissioner Hall asked Mr. Androphy what prompted this suggestion. Mr. Androphy responded that citizens from around the state have called the office with questions regarding the Commission. Commissioner Purser agreed that visiting other cities in the future will be a positive step for the Commission.

Mr. Androphy announced that there are bills regarding the Commission that are calendared for House and Senate committee meetings. He stated that Allegra Montgomery Walker would be present at the Senate State and Local Committee today to respond to any questions regarding the bill that proposes to limit the Commission's ability to impose penalties on state officials. He also stated that the bill which authorizes Shelby County to opt into the Commission's jurisdiction has moved in both Houses and will probably be signed into law.

Commissioner Knight asked about the need to discuss the budget for additional personnel while the legislators are still in session. Chairman Garland stated that he and Mr. Androphy had discussed the budget and came to the determination that the existing funds would cover the upcoming expenses. Mr. Androphy also stated that the \$100,000 budget request had been approved by the Senate Finance Committee for the NICUSA comprehensive electronic filing system. Mr. Androphy provided each Commissioner with a current listing of the budget items. He discussed the three categories that are available for carry-over for the next fiscal year; current services, the state appropriation, and start-up costs.

**CHAIRMAN GARLAND RECESSED THE MEETING AT 10:07 A.M. FOR A SHORT BREAK AND RECONVENED THE MEETING AT 10:10 A.M.**

Mr. Androphy continued the budget discussion and stated that the state appropriation could possibly be carried over, but this must be approved by the Department of Finance and Administration. Commissioner Knight asked if the current budget is sufficient if current costs were prorated for the entire year. Mr. Androphy responded that the Commission would still be within budget if it were prorated for the year.

Mr. Androphy stated that the start-up costs could also be carried over with the approval of the Department of Finance and Administration. He stated that he does not anticipate a problem to carry over this amount.

Chairman Garland stated that this presented budget is not final and there will be more discussion regarding it in the future.

Mr. Androphy added that the current lease at the SunTrust building is an emergency lease for one year only. He stated that the lease ends on December 28, 2007, and that the Department of Finance and Administration will be looking for a five-year lease for the Commission's office in the fall of 2007. Commissioner Hall asked where the lease amount was located in the budget. Mr. Androphy responded that it was located under operations.

CHAIRMAN GARLAND RECESSED THE MEETING AT 10:23 A.M. IN ORDER FOR THE COMMISSIONERS TO ACQUIRE A STATE IDENTIFICATION TAG.

CHAIRMAN GARLAND RECONVENED THE MEETING AT 11:06 A.M.

MR. ANDROPHY MOVED THE DISCUSSION TO THE SEMI-ANNUAL LOBBYING EXPENDITURE REPORT.

Mr. Androphy requested approval to add a line in the semi-annual lobbyist expenditure form to ask employers for their federal tax identification number in order to obtain the information for the new lobbyist and employer of lobbyist registration system. Commissioner Knight asked if the tax identification number would be kept confidential. Mr. Androphy stated that the number would not be available to the public. Commissioner Knight suggested utilizing the numbers assigned by the Secretary of State. Mr. Androphy proposed using the last five digits of the tax identification number. Commissioner Hall agreed with this option for utilizing the last five digits. Commissioner Neal suggested putting language in the form to explain why the number is being requested of the employers and that their submission would be voluntary.

Mr. Androphy stated that he plans for a group e-mail to be sent as early as Thursday to all the lobbyists and employers of lobbyists regarding the employers' requirement to file the expenditure report.

Commissioner Purser questioned the separate line to report aggregate in-state event amounts. Mr. Androphy read the portion of the statute that requires this amount to be separately reported on the form.

Commissioner Knight presented her concerns with the separate categories under the lobbyist compensation question on the form. She stated that the Commission should not require employers to break down the compensation amount into these separate listings.

Commissioner Neal stated that this issue was discussed during the ethics reform drafting. She agreed with Commissioner Knight that there were concerns by the lobbyists that the form as drafted could be used to determine how much an individual lobbyist personally earned, which was not the intended purpose of the disclosure. Commissioner Neal requested more information from Mr. Androphy regarding the statutory authority for the current breakdown of the form. He stated that one purpose of Question 5 was to provide clarity to the staff.

Commissioner Hall asked for clarification regarding third party payments. Commissioner Hall stated that he would be inclined to adhere very carefully to the language of the statute, and he agrees with the suggestion of Mark Greene, of the Tennessee Lobbyist Association, to limit the categories for the types of information requested.

Commissioner Knight affirmed her belief that the Commission's job is to follow the statute that has been provided and she also agreed with Mr. Greene's suggestion.

Commissioner Neal suggested that, in the future, the Commission may request a clarification or an expansion of the law in order to obtain more information.

Mr. Androphy agreed to modify Question 5 to only have one requested answer. There was consensus on this change.

Commissioner Neal moved to approve the modified version of the semi-annual lobbying expenditure report.

Commissioner Hall seconded the motion.

A majority approved the motion.

Commissioner Neal recommended keeping the original employers' reporting date for May 15, 2007. There was agreement to keep this reporting date.

CHAIRMAN GARLAND TOOK A BRIEF RECESS AT 11:43 A.M. AND RECONVENED THE MEETING AT 11:59 A.M.

CHAIRMAN GARLAND REQUESTED MR. ANDROPHY TO BEGIN THE DISCUSSION ON ADVISORY OPINION NUMBER 07-02 REGARDING GIFTS BASED ON CLOSE PERSONAL RELATIONSHIPS.

Mr. Androphy discussed the substantive changes suggested by Commissioner Knight. He requested the Commission make a determination whether the language should read "presumption" or "indication" as it relates to personal gifts and the use of corporate expense accounts. Commissioner Knight suggested that "indication" is the more appropriate language choice, as every other factor was in terms of an "indication" rather than a "presumption." There was a consensus for this language change.

Commissioner Neal referred to the portion of the Ethics Reform statute that requires advisory opinions to be rendered in response to a specific request with a given set of facts. She suggested introducing this information as a guideline rather than as an advisory opinion. Commissioner Knight agreed.

Mr. Androphy informed the Commission that the personal gift issues were frequently posed as questions to the staff. He stated that ultimately this type of information should be included in the regulations, but the proposed draft was to assist those with questions in the interim.

Commissioner Knight suggested including whether there was a previous relationship between the lobbyist and the official. She stated that she would also like to acknowledge that other family members meet the definition of close personal friendships, not just immediate family members. Commissioner Neal affirmed her belief that these types of definition issues would be resolved with a specific advisory opinion request.

Mr. Androphy discussed Commissioner Knight's proposed change to the third factor. She suggested removing the requirement for the exchange of gifts of similar value. Mr. Androphy opined that reciprocity of gifts is not enough to establish a close personal friendship relationship, especially if the gifts' values are disproportionate. Commissioner Hall agreed that the value of the gift could be a relevant factor for making a decision as to whether a gift should be considered a personal gift. Chairman Garland suggested changing the language from "should" to "would" for guideline purposes to this section. Commissioner Purser agreed. There was a consensus to keep the "similar value" language for consideration in this third factor.

Commissioner Neal moved to approve the guidelines subject to the changes made today, as well as titling the information as guidelines, rather than as an advisory opinion. Commissioner Hall seconded the motion.

The motion passed to accept the guidelines with the changes.

Mr. Androphy discussed the fourth factor regarding similar gift giving to a number of public officials, to negate the inference that the gift is provided based on a close personal friendship. Commissioner Knight provided a hypothetical scenario in which a state official lives in a neighborhood and one of the neighbors gives a jar of home-made jelly to everyone in the neighborhood as a holiday gift. She opines that this type of personal acquaintance should be another exception because the gift is not being given to influence the public official.

There was a consensus to change the language to Commissioner Knight's suggestions for this fourth factor.

Mr. Androphy discussed the fifth factor regarding the timing of the gift. Commissioner Knight questioned consideration of this factor when the gift is premised on a close personal friendship. Commissioner Purser offered an example of a policy at his company. He stated that when his company is in the negotiating process for contracting, political contributions are prohibited, even if the person has been asked to make a contribution to a charitable organization related to a candidate. He believes this policy helps to avoid any appearance that a gift is being used for influence.

Chairman Garland reminded the Commissioners that this information was now being presented as guidelines, which would inevitably include some grey area. He suggested leaving the language in this fifth factor which states "unless there are countervailing reasons for the timing of the gift." He also suggested giving examples in the ethics trainings to provide further guidance.

Commissioner Neal suggested that a conclusion may no longer be needed, as the information is now being presented as guidelines. Mr. Androphy announced that the document would be redrafted as guidelines with the standard 72-hour window for changes by the Commissioners.

ANNE TURNER, GENERAL COUNSEL FOR THE COMMISSION, BEGAN THE DISCUSSION OF THE PUBLIC RECORDS RULES.

Ms. Turner reviewed the procedural history of the current draft of the rules. Ms. Turner suggested utilizing Commissioner Knight's draft as the working draft for today's meeting. Ms. Turner stated that the major changes from the last meeting related to the individualized listings in the Public Records Act. She also stated that the current draft streamlined the request for documents and the copying of documents sections.

Commissioner Knight's draft had a change to the word "redact" to the layman's language of "conceal" or "cover." Commissioner Hall stated that he preferred to leave the language as "redact." Consensus was held to keep the language as originally drafted with "redact."

Ms. Turner discussed a request for a confidential record. She suggested that the Commission must make a determination as to what procedures should be followed in these rare instances. Commissioner Neal stated that there are only two statutory exceptions provided by law regarding this issue.

Commissioner Neal also stated that the rule was designed to permit the Commission to charge for copies of documents. She suggested putting the address for the location of the records in the scope of the rules, specifically for those records that will not be obtained electronically. Also, Commissioner Neal stated that she had researched other agencies' rules and had determined that the Commission was the only body that would permit obtaining records by telephone, e-mail, and fax, in addition to regular mail and in-person requests. She stated that these additional request options may limit the Commission's ability to obtain a name, address, and phone number of the person requesting the documents. Mr. Androphy agreed that an initial telephone request should be followed by some type of written request, such as an e-mail or a fax.

Ms. Turner discussed the timeliness of a records request. Commissioner Neal stated that many of the other agencies have some type of time frame for meeting records requests within their rules. She suggested that a written request for documents will enable the Commission to determine if the records were provided in a timely manner.

Commissioner Knight questioned the current and future capability of our computer software to meet certain records requests. Mr. Androphy stated that currently much of the reported information is stored in different databases in which the fields can be broken down for specific requests. He also stated that the upcoming electronic filing will allow for much easier access to records and reports online.



Commissioner Neal suggested applying the costs for technology improvements to meet document requests to the Commission's capital costs. Anne Turner suggested that the particular technology cost provision is designed to address a one-time expense for one person's particular purpose only.

Commissioner Neal posed a question about access. She questioned whether the Commission must provide the records in the specific format requested. Anne Turner stated that the Commission is not required to provide the information in the specific format requested. Mr. Androphy affirmed that the Commission does not have to meet the request for a specific format to meet the requirements of the law. He suggested that if an individual does wish to have the information in a certain format, other than a paper copy, it may be his or her burden to pay the additional cost associated with the request. Commissioner Neal suggested that this must be clearly established in the rule if it is determined to be the desired effect. She also stated her concern that some areas in the proposed rule may be trying to cover so many possible scenarios that it may give the impression that the Commission is creating greater distance between the public and access to the record. She expressed her desire to eliminate this unintended result. Chairman Garland agreed that it is not the intent of the Commission to limit access to the records.

Commissioner Neal referred to the section of the rules regarding the ability for a person to bring his or her own equipment to the office for document copying. She requested that the rules clearly establish that the records will still be in the custody of the Commission. Commissioner Knight clarified that custody should include observation by the Commission staff person of the copying process performed by the individual that utilizes his or her own copying equipment.

Commissioner Knight asked Ms. Turner if "public record" was removed as a defined term. Ms. Turner stated that it had been removed from the current draft. Commissioner Knight suggested including a new definition of "public records," as the term is used throughout the rules.

Commissioner Knight renewed her concerns regarding charging the person making the records request for staff time. Commissioner Neal stated that she had reviewed other agencies' rules and suggested only charging for staff time if the request takes more than a set number of hours. Mr. Androphy suggested only charging for staff time if the copying request takes over two hours. Commissioner Knight also questioned which staff hourly rate would be referenced in this section. Mr. Androphy suggested it should be based on the employee's base salary. Ms. Turner agreed to provide a copy of another agency's similar rule regarding the additional charge for staff time to the Commissioners.

Commissioner Neal also announced that the Governor's office has put a moratorium on rule-making by the executive departments, so that the Public Records Commission and the committee that is examining the Public Acts can make their review. She opined

that, although this moratorium does not apply to the Commission, some guidance may be obtained by the Commission before its rule-making process is complete.

Commissioner Neal also suggested that there should be some reference to the retention of the records in the rules, including some information regarding the Records Management Commission about how the records will be maintained. She stated that the Ethics Reform Act refers to the proper retention of the records. Commissioner Knight affirmed that the proper retention of the records is also discussed in the Public Records Act.

There was consensus to approve the public rules with the suggested changes.

**MR. ANDROPHY DISCUSSED THE INFORMAL GUIDELINES WRITTEN TO ASSIST LOBBYISTS IN PREPARING FOR THE COMMISSION'S RANDOM AUDIT.**

Mr. Androphy stated that the Commission staff hoped to begin conducting audits of lobbyists in June. He stated that the proposed guidelines would give notice to the lobbying community, as well as to staff, regarding what type of items will be included.

Mr. Androphy referred to Commissioner Knight's suggestions on the draft. He stated that he believes the information, as to whether a lobbyist timely registered, should be disclosed to the public. Commissioner Knight clarified that no penalty would be imposed as a result of the audit.

Mr. Androphy referred to Tenn. Code Ann. § 3-6-306, which gives the Commission the authority to assess civil penalties if a lobbyist knowingly maintains a lobbying agreement with an employer where the lobbyist knows the employer is not properly registered with the Commission. Mr. Androphy clarified that this statute is reciprocal in nature, as an employer may not continue a lobbying agreement with a lobbyist he or she knows is not properly registered. He suggested an example that if a lobbyist has registered, but the employer has not yet registered, this information obtained from an audit should also be disclosed to the public. Commissioner Knight questioned how the lobbyist could document his or her best efforts to get the employer to register. Mr. Androphy suggested that this issue may be answered by the lobbyist in a follow-up question for the audit. Commissioner Knight also suggested putting this statute section in the guidelines.

Commissioner Purser suggested language in the note section to be changed to read, "These guidelines are subject to change and the Commission may request additional records."

Commissioner Neal asked what types of documents can be audited. Mr. Androphy referred to the statute for the specific definition. She also asked whether a lobbyist has an opportunity to file a grievance if they have a specific disagreement with the audit. Ms. Turner discussed the procedure the Comptroller's office uses, along with their procedure

for handling audit grievances. Mr. Androphy stated there would be an opportunity for a person to respond to a draft audit, and a statement would be provided in the guidelines to state as such.

Commissioner Hall suggested changing the language in item 3 on page 1, to ask if the entire lobbyist registration form is accurately completed, rather than specifically asking about Question 6 and Question 9. There was consensus for this language change.

Mr. Androphy referred to the section of the guidelines regarding lobbyists' compensation and the need to determine if the compensation was based on a contingency fee. He stated that this type of lobbyist agreement is the only type of prohibited agreement under the Act. He also suggested putting a statutory reference to this section in the guidelines.

Commissioner Knight questioned the need for a copy of the written employment agreement for an audit. She suggested an alternative for a lobbyist to file a statement stating that the agreement was not based on any type of contingency agreement. Commissioner Knight stated her concern that, if the written lobbying agreement was requested, it may then become a public record. Commissioner Knight suggested another alternative would be to only look at these agreements to gather the necessary information, rather than taking custody of the records. There was a consensus to accept this proposed change.

Mr. Androphy referred to a concern of Mark Greene, of the Tennessee Lobbyist Association, regarding lobbyist reporting documentation for in-state events. Mr. Androphy confirmed that a lobbyist is only responsible for reporting the costs associated with a lobbyist-sponsored in-state event, and would not include the documentation for the costs associated with an in-state event hosted by an employer.

Mr. Androphy discussed Commissioner Knight's suggested change to the information requested relating to lobbyist compensation disclosures on the Semi-Annual Lobbying Expenditure Report. Mr. Androphy confirmed that the Commission can only verify that the compensation reported falls into the particular monetary range. Commissioner Knight affirmed her belief that the Commission does not need to take custody of the documents that show the exact dollar amounts that were paid to a lobbyist.

Commissioner Neal stated that many of these types of questions could be answered if the Commission knew whether or not the General Assembly intended the broad definition of "audit" that appears in the statute or if the Members intended a stricter reading as suggested by Senator Kyle at the last meeting.

More discussion followed regarding the need to take custody of the employment agreement for the purpose of determining the lobbyist compensation range. Commissioner Purser suggested adding language in the audit to read, "The auditor verified the range of compensation as reported in the semi-annual lobbying expenditure report." There was consensus to this change.

There was consensus and approval of the lobbyist audit guidelines with the suggested changes, along with the 72-hour window for any other stylistic changes.

CHAIRMAN GARLAND STATED THAT THE DISCUSSION REGARDING THE MEMORANDUM OF AGREEMENT WOULD BE ROLLED UNTIL THE NEXT MEETING.

CHAIRMAN GARLAND ANNOUNCED THE NEXT MEETING TO BE TUESDAY, MAY 22nd, AT 9:00 A.M.

Chairman Garland also announced a work session for the Commissioners to be scheduled in May or June.

*Note: After this meeting, the Commission meetings in June were scheduled for the afternoon of Wednesday, June 27 and the morning of Thursday, June 28.*

THERE BEING NO FURTHER BUSINESS, CHAIRMAN GARLAND ADJOURNED THE COMMISSION MEETING AT 2:50 P.M.

Respectfully Submitted,

Melinda R. Arrington